IN THE

Supreme Court of the United States

No. 73-1200

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTRIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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No.

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,

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v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Commonwealth of Pennsylvania and Pennsulvania Public Utility Commission, respectfully pray that a writ of certiorari issue to review two judgments of the United States Court of Appeals for the Third Circuit, entered in this proceeding on September 20, 1973 as amended November 2, 1973,[1] and on January 18, 1974.

OPINIONS BELOW

The first opinion of the U.S. Court of Appeals is reported as *In Re Central Railroad Company of New Jersey*, 486 F.2d 1124, and is printed in Appendix A hereto (App., 1a-

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[1] Rehearing denied November 5, 1973.

6a). The unreported order of the reorganization court for The Central Railroad Company of New Jersey (No. 550) is printed in Appendix A (App., 9a-10a).

The second opinion (judgment order) of the U.S. Court of Appeals is not reported, and is printed in Appendix B hereto (App., 11a). The unreported order of the same reorganization court (No. 583), together with the letter-opinion of the court, are printed in Appendix B (App., 12a-16a).

The opinions of the Interstate Commerce Commission are reported as *Central R. Co. of New Jersey - Abandonment*, 342 I.C.C. 227, and *Routing via Oak Island Jct., New Jersey*, 341 I.C.C. 129. The unreported orders denying petitions for rehearing are printed hereto in Appendix C (App. 17a-20a).

JURISDICTION

The first judgment of the U.S. Court of Appeals was entered on September 20 as amended November 2, 1973, rehearing denied November 5, 1973 (App., 7a-8a). The second judgment was entered on January 18, 1974 (App. 11a). The jurisdiction of this court is conferred by 28 U.S.C. 1254(1), 2101(c).

QUESTION PRESENTED

Whether judicial review of line abandonment and tariff routing orders of the Interstate Commerce Commission, involving a railroad in reorganization, should be instituted in the reorganization court, or whether such review should take place in a three-judge district court under the Urgent Deficiencies Act and venue provisions of the Judicial Code.

STATUTES INVOLVED

The statutes principally involved are sections 1336, 1398 and 2325 of the Judicial Code, 28 U.S.C. 1336, 1398 and 2325. They are set forth in Appendix C (App., 21a-22a).

STATEMENT

This case concerns the proper federal court which should review orders of the Interstate Commerce Commission where one or more of the railroads involved in the agency proceeding is in reorganization.

I.C.C. Proceedings

The Central Railroad Company of New Jersey (CNJ) is in reorganization.[2] In May, 1971, it filed various abandonment applications with the Interstate Commerce Commission (I.C.C.), pursuant to section 1(18)-(20) of the Interstate Commerce Act[3] seeking, as here pertinent, to abandon its operation over leased lines in Pennsylvania, which extend generally from the New Jersey-Pennsylvania boundary at Phillipsburg to Scranton. The leased lines are known as the Lehigh & Susquehanna Railroad (L&S). The L&S is owned by Reading Company (Reading),[4] subject to a leasehold interest held by Lehigh Coal & Navigation Company (LC&N).

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[2] No. B-401-67 (D.N.J.). Section 77 of the Bankruptcy Act, 11 U.S.C. 205.

[3] 49 U.S.C. 1(18)-(20).

[4] Reading is in reorganization. Bank. No. 71-828 (E.D. Pa.)

Lehigh Valley Railroad Company (Lehigh Valley)[5] and Reading filed rival applications to extend their operations[6] over the L&S lines, subject to prior approval of CNJ's applications for abandonment of operation.

Beginning in September, 1971, CNJ and its connecting railroads filed various tariff schedules naming changes in routes, so as to substitute interchange points for traffic moving over the L&S lines. These tariff schedules were suspended pursuant to section 15(7) of the Interstate Commerce Act.[7]

Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission, (collectively, "Pennsylvania"), vigorously opposed CNJ's withdrawal from the Commonwealth, and also opposed the related tariff changes.

CNJ on April 1, 1972, abruptly ceased operations in Pennsylvania, while the I.C.C. proceedings were still in progress. CNJ did this by virtue of an order from its reorganization court, which was affirmed without opinion by the Court of Appeals. 455 F.2d 989 (3rd Cir. 1972), cert. den. 409 U.S. 889.

The I.C.C. on May 26, 1972 (served June 2), issued its initial decisions in the abandonment-extension case (Finance Docket No. 26659), and in the tariff routing case (Investigation & Suspension Docket No. 8667). The I.C.C. concluded to grant CNJ's abandonment application and to grant Lehigh Valley's extension application, subject to various routing conditions. 342 I.C.C. 227 and 341 I.C.C. 129. Pennsylvania, and other parties, petitioned for reconsidera-

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[5] Lehigh Valley is in reorganization. Bank No. 70-432 (E.D. Pa.)

[6] The applications were considered under 49 U.S.C. 1(18)-(20). The Reading application did not include the entire L&S lines.

[7] 49 U.S.C. 15(7).

tion.[8] These petitions were denied August 23, 1972 (served September 11).

Court Proceedings

Pennsylvania applied to the CNJ reorganization court for permission to review the CNJ abandonment orders in the U.S. District Court for the Middle District of Pennsylvania; Pennsylvania instituted an action to review the Lehigh Valley and Reading extension orders in the U.S. District Court for the Middle District of Pennsylvania.[9]

Pennsylvania was required to seek leave of the CNJ reorganization court, prior to the institution of judicial review of the CNJ abandonment and tariff routing orders, by virtue of an earlier court order which enjoined all persons from instituting or maintaining actions affecting CNJ's operations in Pennsylvania in any court other than the CNJ reorganization court, or without obtaining permission of that court to do so.

The CNJ reorganization court denied Pennsylvania's petition for leave to sue in the U.S. District Court for the Middle District of Pennsylvania. No opinion was rendered. (App., 12a-16a). Pennsylvania appealed that determination.

The Court of Appeals affirmed both decisions. In its first opinion, the Court of Appeals reasoned that Congress intended appeals of abandoment orders in railroad reorganization cases to be reviewed in the context of the reorganization proceeding and not in a court of coordinate jurisdiction. The court suggested that Pennsylvania should have appealed from Order No. 514, entered July 5, 1972, which

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[8] 49 U.S.C. 17(6); 49 C.F.R. 1100.101.

[9] Civil No. 73-63, *Pennsylvania v. United States* (M.D. Pa.)

authorized CNJ's trustee to implement the I.C.C. orders of May 26, 1972, prior to the disposition by the I.C.C. of petitions for reconsideration on August 23, 1972. The court said that the reorganization court could have convened a three judge district court under the Urgent Deficiencies Act at the hearing on Order No. 514.

The court considered the I.C.C.'s consideration of the abandonments as being a "referral" case governed by 28 U.S.C. 1336(b) and 1398(b). Those sections of the Judicial Code require that the district court which refers a question or issue to the I.C.C. for determination shall have exclusive jurisdiction and venue of any civil action to enjoin any order of the I.C.C. arising out of such referral. (App., 21a).

The Court of Appeals specifically relied also upon its earlier decision, 455 F.2d 989, resulting in the abandonment of CNJ's lines in Pennsylvania.

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The decisions below require that public agencies bring a "civil action" in the railroad reorganization court to review I.C.C. orders affecting the carrier in reorganization, rather that in a statutory three-judge court. Here, Pennsylvania resides and has its principal offices within the jurisdiction of the U.S. District Court for the Middle District of Pennsylvania, and not in the District of New Jersey. Moreover, a railroad reorganization court is a single-judge court, whereas judicial review of I.C.C. orders under the Urgent Deficiencies Act takes place in three-judge district courts which are convened by the Chief Judge of the Circuit. The United States

of America is the defendant in such actions. 28 U.S.C. 2321-25.

Heretofore, it has been the settled practice to institute actions directly in three-judge courts against the United States to enjoin I.C.C. abandonment and tariff routing orders. Indeed, the Supreme Court decided this question in *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, a case involving a railroad in reorganization under section 77 of the Bankruptcy Act. The Court stated, 328 U.S. at 151, fn. 11:

> If the (abandonment) order of the Commission were challenged, its review could of course be had only in the manner provided by statute. See *El Dorado Oil Works v. United States*, 328 U.S. 12.

The exception to the rule that I.C.C. abandoment orders are reviewed in three-judge courts is where the abandonments are considered by the I.C.C. together and as part of the plan of reorganization under section 77(e) and 77(f) of the Bankruptcy Act. *Chicago & N.W. Ry. Co. v. United States*, 52 F. Supp. 65 (N.D. Ill. 1943), aff'd 320 U.S. 718; *New Haven Inclusion Case*, 399 U.S. 392, 429 (1970); *In Re Missouri Pac. R. Co.*, 93 F. Supp. 852, 863 (E.D. Mo. 1950). The instant proceedings are not part of the plan of reorganization. At the request of CNJ, the I.C.C. has deferred the institution of any hearings on CNJ's plan of reorganization, and the I.C.C. specifically declined to consolidate the abandonments with any plan of reorganization.

There are a number of railroads undergoing reorganization in the Northeastern part of the United States. The question presented is of considerable importance to the orderly administration of the judicial system.

I. I.C.C. Orders Involving a Railroad in Reorganization Are not Made by Referral From a District Court.

Congress in 1964 amended sections 1336 and 1398 of the Judicial Code, 28 U.S.C. 1336, 1398, to provide where the district court refers a question or issue to the I.C.C., the court which referred the question shall have exclusive jurisdiction and venue of a civil action to enjoin or set aside any order of the I.C.C. arising out of the referral, and such action shall be filed within 90 days from the date the I.C.C. order becomes final. There is nothing in the legislative history of these amendments to the Judicial Code to suggest that instructions by a reorganization court that the trustee file certain applications and tariffs with the I.C.C. makes any action by the trustee a "referral" question. See: *I.C.C. v. Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966).

Indeed, a "district court" is not the same as a "reorganization court", and the concept of a "civil action" being filed in a "reorganization court" has obvious difficulties.

The I.C.C. decisions authorizing abandonments and tariff routing changes were rendered exclusively under the provisions of the Interstate Commerce Act. Judicial review should take place in the statutory manner provided for review of I.C.C. orders, i.e., under the Urgent Deficiencies Act. This court observed in *Callaway v. Benton*, 336 U.S. 132, 142, that "Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate."

The decision of the Court of Appeals, in effect, means that all I.C.C. orders of any type, affecting a railroad in reorganization, can be made subject to judicial review in a single judge court, rather than be subject to judicial review in statutory three-judge courts.

II. The Reorganization Court Cannot Cut Off Pennsylvania's Remedies Under the I.C.C.'s Rules.

The Court of Appeals relies heavily upon Order No. 514 of the reorganization court, entered July 5, 1972, suggesting that Pennsylvania should have taken an appeal from that court order which authorized CNJ's trustee to implement the I.C.C. orders. But the I.C.C. orders of May 26, 1972 were subject to petitions for reconsideration.

There clearly was no basis for an appeal from the July 5 order. There was no change in the status quo – CNJ had ceased operations in Pennsylvania several months prior thereto. The authority of the CNJ reorganization court flowed from the I.C.C. orders, and those orders were subject to petitions for reconsideration.

It is premature to progress judicial review of I.C.C. orders while petitions for reconsideration are pending. The I.C.C. orders were not "final" at the time of hearing on Order No. 514. As Judge (now Chief Justice) Burger noted in *Outland v. C.A.B.*, 284 F.2d 224 (D.C. Cir. 1970):

> "However, while making judicial review available without a motion for rehearing, that statute did not operate to repeal the law with respect to finality. Where a motion for rehearing is in fact filed there is no final order until the rehearing is denied, as we said in *Braniff Airways, Inc. v. Civil Aeronautics Board*, supra."

Further, Pennsylvania cannot urge upon review of an I.C.C. order any contentions not previously urged in the agency proceeding by some party. Thus to require judicial review prematurely would act to eliminate substantive rights. *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-38 (1952); *Yonkers v. United States*, 320 U.S. 685, 688 (1944).

There is a duty of a party to exhaust his administrative remedies before seeking judicial review of the agency determination. *Myers v. Bethlehem Corp.*, 303 U.S. 41, 50-51 (1938).

The theory of the Court of Appeals is that review of the I.C.C. orders should be in the context of the reorganization proceeding. However, the reorganization procedure conflicts with the agency's procedure regarding petitions for reconsideration, established by statute as well as regulation. 49 U.S.C. 17(6); 49 C.F.R. 1100.101.

III. The Decision of the Court of Appeals Is Inconsistent with Its Own En Banc Ruling.

The Court of Appeals placed reliance upon its 1972 decision permitting CNJ to cease operations in Pennsylvania by virtue of the order of the CNJ reorganization court, and without the necessity of prior approval from the Interstate Commerce Commission. Yet that decision was effectively overruled a year later by the en banc decision in *In Re Central Railroad Company of New Jersey*, 485 F.2d 208.

This court denied certiorari on January 4, 1974. *R. D. Timpany v. State of New Jersey, et al.*, 42 U.S. Law Week 3384.

CONCLUSION

For these reasons, the Court should issue a writ of certiorari to review the judgments of the Third Circuit.

Respectfully submitted,

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February, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1110

In the Matter of

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Debtor

COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D. C. No. B 401-67)

Argued July 20, 1973
Before VAN DUSEN and WEIS, *Circuit Judges.*

Reargued September 12, 1973
Before VAN DUSEN, ROSENN and WEIS, *Circuit Judges.*

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OPINION OF THE COURT

(Filed September 20, 1973)

(As amended November 2, 1973)

PER CURIAM:

This appeal challenges the right of a Section 77 reorganization court to deny the Commonwealth of Pennsylvania and its Public Utility Commission leave to file an action in the United States District Court for the Middle District of Pennsylvania to review orders of the Interstate Commerce Commission, concerning tariff routings and authorizing the abandonment by the reorganization trustee of certain lines in Pennsylvania and western New Jersey.[1]

After the debtor had lost more than 100 million dollars from 1958-1971, the trustee presented in 1971 a "blueprint for survival" to deal with a severe liquidity crisis which threatened termination of all its operations. An important part of this "blueprint" involved abandonment of the debtor's unprofitable operations in Pennsylvania[2] and reduction of the debtor's operations to six heavily populated and industrialized north-central New Jersey counties. On May 7, 1971, and thereafter the trustee, pursuant to section 77(o) of the Bankruptcy Act (11 U.S.C. § 205(O)),

1. Order No. 550 dated December 20, 1972 (D.N.J. Bankruptcy No. 401-67), contained this language, *inter alia*:

"IT IS, . . . ORDERED that the petition for leave to file an action against the United States of America in the United States District Court for the Middle District of Pennsylvania to judicially review certain orders of the Interstate Commerce Commission in Finance Docket No. 26659 and in Investigation and Suspension Docket No. 8667 is denied; . . . ."

2. These operations were to be conducted by the Lehigh Valley Railroad, which operated parallel lines in Pennsylvania at that time.

sought the approval of the reorganization court for abandonment of various portions of lines operator by the debtor, including those in Pennsylvania, and these applications eventually resulted in Orders Nos. 410, 451 and 514 approving abandonments. As a result of the May 7, 1971, and subsequent applications, the reorganization court authorized the trustee to file requests for authorizations with the Commission for such abandonments, which requests were granted on August 20, 1971, and May 26, 1972. On December 20, 1971, the reorganization court issued Order 445, directing the trustee to suspend all CNJ operations in Pennsylvania by April 1, 1972, pending the Commission's final decision on the abandonment application, and enjoining all parties from instituting or maintaining in any other court any action affecting CNJ operations in Pennsylvania, or the abandonment thereof, without the permission of the reorganization court. This court affirmed Order 445, *In the Matter of Central Railroad Company of New Jersey, Debtor,* 455 F.2d 989 (3d Cir. 1972). On May 26, 1972, the ICC granted the debtor permission to abandon all its lines in Pennsylvania, subject to certain conditions. *Central Railroad Company of New Jersey-Abandonment,* 342 I.C.C. 277 (1972).[3] After hearing, the reorganization court,

3. The Commission used this language in its "Conclusions" at 288 and 290-91:

"The overriding factor with which we are faced, is that since 1967, CNJ has been debtor in reorganization under the Bankruptcy Act before the United States District Court for the District of New Jersey. Its position has continuously deteriorated, as have other railroads serving the New York metropolitan area. CNJ now may be considered *in extremis.* During and since 1970, its losses have amounted to more than $1 million per month. Under the circumstances, some form of drastic remedial action became imperative. The subject application to abandon, and its various parts, represents CNJ's election, approved by the Reorganization, to seek to terminate all operations in Pennsylvania, and to reduce and restructure its lines and operations in New Jersey. The application is properly filed under section 1(18)-(20).

. . .

"[T]he record as it stands does support our concluding that the fully distributed net income deficits in Pennsylvania have been sizeable each year, even prior to payment of the annual lease rental to LC&N for operation over the lines of L&S. . . . Also, the record establishes, and we find, that the State of New Jersey for some years has provided various forms of railroad passenger and freight service subsidies and other financial aid to CNJ. Obviously, it sought to assure the capability of CNJ to continue in business as a railroad in New Jersey. On the other hand, the

by order No. 514 dated July 5, 1972, authorized (a) compliance by the trustee with such conditions, and (b) the abandonments of the Pennsylvania lines.[4] No appeal was taken from such order.[5] However, by motion returnable December 11, 1972, appellants sought leave to file the action described in the first sentence of this opinion.

We have concluded that the above-quoted language of order No. 550 (note 1) should be affirmed. On the facts presented by this record, including the failure of appellants to appeal from order No. 514 and the affirmance of order No. 445 by this court (455 F.2d 989, *supra*) resulting in the abandonment of the Pennsylvania lines, the reorganization court had the authority to protect its jurisdiction by precluding review of the abandonment of the Pennsylvania lines in any other district court. See 28 U.S.C. §§ 1336(b) and 1398(b);[6] *New Haven Inclusion Cases*, 399

3. (Continued)

Commonwealth of Pennsylvania has not referred to any present or prospective program of assistance to railroads in which CNJ has been or would be able to participate as a recipient."

Its "ultimate findings" at page 304 included this paragraph:

"Subject to the imposition of traffic protective conditions and employee protective conditions set forth in detail in the 'Conclusions' sections of this report, we find in Finance Docket No. 26659 and Finance Docket No. 26659 (Sub-Nos. 1, 2, 3, 5, 9, 10, 11, 12, 14, 15, 21, and 28), that the present and future public convenience and necessity permit abandonment and abandonment of operation by Central Railroad Company of New Jersey and by certain subsidiary companies, all designated hereinbefore and individually identified in title pages of the certificate and order herein, and in greater detail in *appendix A*, attached to the report."

4. It is noted that on timely application to the reorganization court at this hearing, it could have convened a three-judge court under 28 U.S.C. §§ 2321-25. *Cf. Bondholders Protective Committee v. ICC*, 432 F.2d 268, 270-71 (3d Cir. 1970).

5. Because of the basis for the affirmance of the relevant part of Order No. 550 stated below, it is not necessary to determine whether the failure to appeal from such order and the decisions of this court on March 10, 1972 (see *Matter of the Central Railroad Company of New Jersey, Debtor, supra*, and related cases reported at 455 F.2d 988, 989 and 990) require affirmance of such part of Order No. 550 under the principle of law of the case and res judicata. See *Antonioli v. Lehigh Coal and Navigation Co.*, 451 F.2d 1171 (3d Cir. 1971); 1B Moore's Federal Practice, § 0.404(1), pp. 402-03 (2d ed.).

6. Although the parties have not furnished a copy of order No. 410 to this court in the appendices in this appeal, paragraphs 9 and 10 of the Petition of LC&N (Docket 2018 in district court) recite at 24a-1 and 25a of the trustee's appendix, *inter alia:*

U.S. 392, 420-422 (1970); *In re Penn Central Transportation Company*, 446 F.2d 1109, 1111-1112 (3d Cir. 1971); *Bondholders Protective Committee, supra* at 270-71; *In re Huntingdon & Broad Top Mt. R. R. & Coal Co.*, 213 F.2d 411, 416-17 (3d Cir. 1954), where Judge Biggs made the pertinent observation at 417, "It is time that this chapter in the history of [the railroad] is brought to a close."

That part of order No. 550 quoted in note 1 of this opinion will be affirmed.

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6. (Continued)

"9. On May 25, 1971, by order No. 410, this Court authorized the Trustee to file applications with the Interstate Commerce Commission for permission to abandon certain lines then operated by said Trustee, which lines included the L&S system located in Pennsylvania. By said order No. 410, this Court reserved jurisdiction of the subject matter and directed said Trustee to apply further to this Court for authority to abandon any lines or operations that may be authorized to be abandoned by the Interstate Commerce Commission.

"10. On May 26, 1971, the Trustee filed with the Interstate Commerce Commission, pursuant to order No. 410, a petition for abandonment of the aforesaid lines. . . ."

The wording and legislative history of 28 U.S.C. §§ 1336(b) and 1398(b), as well as of § 77(o) of the Bankruptcy Act (11 U.S.C. § 205(o)), show that Congress intended appeals of abandonment orders in railroad reorganization cases to be reviewed in the context of the reorganization proceeding and not in a court of coordinate jurisdiction. See *Leonard Bros. Trucking Co. v. United States*, 301 F. Supp. 893, 898 (S.D. Fla. 1969); House Report 1015, 88th Cong., 2d Sess., to accompany H.R. 7508; see also *ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579-80 (1966); *Keller Industries, Inc. v. United States*, 449 F.2d 163, 166-67 (5th Cir. 1971); *Louisville and Nashville R. Co. v. Knox Homes Corp.*, 343 F.2d 887, 897 n.38 (5th Cir. 1965). When § 77(o) was originally added to the Railroad Reorganization Act in 1935, preliminary drafts of the bill (H.R. 6249, later H.R. 8587, 74th Cong., 1st Sess.) containing that section provided, *inter alia*:

"The conclusion of the judge that any property authorized to be abandoned or sold hereunder, *unless set aside by a court of competent jurisdiction*, shall raise a conclusive presumption that such abandonment or sale was justified and that such trustees were not justified in opposing same." [Emphasis supplied.]

The above-quoted language was omitted from the bill adopting § 77(o) as finally passed. See House Report 1283, 74th Cong., 1st Sess.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 73-1110

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants

(D.C. No. B-401-67 In Bankruptcy)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel, and later reargued.

On consideration whereof, it is now here ordered and adjudged by this Court that that part of order No. 550 of the said District Court which is referred to in the opinion of this Court and quoted in note 1 of said opinion, filed December 20, 1972 be and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ Thomas F. Quinn
Clerk

September 20, 1973

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 73-1110

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and VAN JUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Van Dusen
Judge

Dated: November 5, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of

THE CENTRAL RAILROAD)	In Proceedings for the
COMPANY OF NEW JERSEY,)	Reorganization of a Railroad
Debtor.)	No. B 401-67
	ORDER NO. 550

ORDER DENYING APPLICATION FOR LEAVE TO FILE AN ACTION IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND GRANTING OTHER RELIEF.

This matter having been opened to the Court on petition of the attorneys for the Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission as amended orally at the hearing for (a) leave, pursuant to Order No. 445 of this Court, to file an action against the United States of America in the United States District Court for the Middle District of Pennsylvania to judicially review certain orders of the Interstate Commerce Commission in its Finance Docket No. 26659 and in its Investigation and Suspension Docket No. 8667 and (b) for certain other relief; and the matter having come on for hearing which was duly noticed; and the Court having considered the papers filed and arguments made; and all parties in interest having been heard or having been given the opportunity to be heard; and good cause appearing therefor;

IT IS, on this 20th day of December, 1972,

ORDERED that the petition for leave to file an action against the United States of America in the United States District Court for the Middle District of Pennsylvania to

judicially review certain orders of the Interstate Commerce Commission in Finance Docket No. 26659 and in Investigation and Suspension Docket No. 8667 is denied; and it is

FURTHER ORDERED that petetioner is granted leave to dismiss its action instituted September 24, 1972 in the United States District Court for the Middle District of Pennsylvania bearing Docket No. Civil 71-416; and it is

FURTHER ORDERED that, upon petitioner's request, the appeal of petitioner from Order No. 467 of this Reorganization Court is dismissed.

/s/ Anthony T. Augelli
S.J.U.S.D.C.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 73-1517

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants

On Appeal from the United States District
Court for the District of New Jersey
D. C. No. B-401-67 in Bankruptcy

Argued January 9, 1974

Before: ADAMS, HUNTER and WEIS, *Circuit Judges*

JUDGMENT ORDER

After considering the appellants' contentions that the district court erred in refusing to consider appellants' appeal of an order of the Interstate Commerce Commission because such order was final and the time for appeal had expired, it is is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. *See* In the Matter of the Central Railroad Company of New Jersey, No. 73-1110 (3d Cir. Sept. 20, 1973).

Costs taxed against appellants.

BY THE COURT,

/s/ Arlin M. Adams
Circuit Judge

DATED: January 18, 1974

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
ANTHONY T. AUGELLI
Sr. Judge

305 United States Court House
Newark, N. J. 07101

April 4, 1973

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LETTER OPINION

The Central Railroad Company of New Jersey,
Debtor – Docket No. B. 401-67

Re: Application of The Lehigh Coal & Navigation Company for payment of money under Order No. 441.

Gentlemen:

Reference is made to the transcript of the hearing before this Court on December 11, 1972, and the exhibits marked in evidence at said hearing.

At issue is the finality of an order of the Interstate Commerce Commission (hereinafter ICC) bearing service date of June 2, 1972, which authorized the abandonment of the Debtor's railroad operation in that State of the Lehigh & Susquehanna lines (hereinafter L & S system) under a lease arrangement with the Lehigh Coal & Navigation Company (hereinafter LC&N).

This issue emerged as a result of a petition filed with the Court by LC&N, in which it seeks to compel the Trustee of the Debtor to pay LC&N the sum of $500,000.00, in cash, as an administration expense, under the terms of a settlement agreement entered into between the Debtor's Trustee and LC&N on November 17, 1971, which agreement was approved by this Court's Order No. 441. A condition precedent to the Trustee's obligation to pay LC&N $500,000.00 was the abandonment of the L & S system by the Debtor and the finality of the ICC order permiting abandonment of that operation.

The Trustee is willing to discharge his obligations under the settlement agreement of November 17, 1971, provided the ICC order of June 2, 1972, is a final order. The finality of that order was challenged in a joint petition filed by the Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission (hereinafter collectively Pennsylvania). At the hearing of December 11, 1972, Pennsylvania applied for leave to file a three-judge court action in the Middle District of Pennsylvania to review the ICC order of June 2, 1972, which authorized abandonment of the Debtor's Pennsylvania operations. The application was denied by this Court's Order No. 550.

The abandonment of the operation of the L & S system in Pennsylvania by the Debtor was effected pursuant to Section 77(o) of the Bankruptcy Act. After hearing, this Court, by Order No. 514 entered on July 5, 1972, authorized the abandonments granted by the ICC order of June 2, 1972. On July 3, 1972, Pennsyvlania filed with the ICC a petition for reconsideration of the abandonment orders involving Debtor's Pennsylvania operations, which petition was denied in September, 1972. No appeal was

taken from this Court's Order No. 514, notwithstanding that any order made by a judge under Section 77(o) "shall be a final order for purposes of appeal."

The time to appeal has long since expired and Pennsylvania should not now be heard to complain about the ICC order of June 2, 1972, or of this Court's Order No. 514, entered July 5, 1972, which authorized the abandonment granted by the ICC of the Debtor's operation of the L & S system in Pennsylvania. No application was made to have this Court stay its hand pending a decision by the ICC on the petition for reconsideration filed by Pennsylvania. In any event, and as previously noted, said petition for reconsideration was denied.

Under the circumstances, this Court finds that the conditions precedent set forth in the settlement agreement of November 17, 1971, have been fully met; that there is finality to the ICC orders and the orders of this Court regarding the abandonment of the Debtor's operations in Pennsylvania; and that the Trustee should make suitable arrangement s, pursuant to the terms of the agreement, to pay LC&N the sum of $500,000.00 in full settlement of all claims arising out of the operation of the L & S system in Pennsylvania by the Debtor.

Counsel for the Trustee will please submit an appropriate order on notice to all parties concerned.

Yours very truly,

/s/ Anthony T. Augelli

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of	)	
		In Proceedings for the
THE CENTRAL RAIL-	)	Reorganization of a Railroad
ROAD COMPANY	)	
OF NEW JERSEY,	)	No. B 401-67
Debtor.	)	
		ORDER NO. 583

ORDER TO CONSUMMATE SETTLEMENT WITH THE LEHIGH COAL & NAVIGATION COMPANY

This matter having been opened to the Court by application of The Lehigh Coal & Navigation Company for payment of monies due under Order No. 441, the matter having come on for hearing on December 11, 1972, which was duly noticed and all parties in interest having been heard or having been given an opportunity to be heard, and the Court having considered all papers filed in connection therewith and all arguments of counsel and having decided the application by a letter opinion dated April 4, 1973, and good cause appearing therefor,

IT IS, on this 15th day of May, 1973,

ORDERED that:

(1) The Trustee be and is hereby directed to fully consummate the settlement embodied in the agreement authorized by Order No. 441, including the payment of $500,000 to The Lehigh Coal & Navigation Company;

(2) Said payment may be made by the Trustee borrowing such funds for a period, which may be less than but shall not exceed 4 years, from monies held in a special account pursuant to Order No. 157, upon terms to be fixed by further order of this Court; and

(3) The Trustee, when paying said $500,000 to The Lehigh Coal & Navigation Company, is directed to make suitable arrangements to protect the interests of this estate in the event the aforesaid direction to consummate the settlement, including the payment of $500,000 set forth in Paragraph 1 hereof, is reversed upon any appeal from this Order.

/s/ Anthony T. Augelli
S.U.S.D.J.

APPENDIX C

SERVICE DATE
SEPTEMBER 11, 1972

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23rd day of August, 1972.

Finance Docket No. 26659

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION BETWEEN PHILLIPSBURG, N. J. AND HUDSON, PA.

Finance Docket No. 26659 (Sub-No. 1)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION MINSI TRAIL BRANCH IN LEHIGH COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 2)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION NESQUEHONING VALLEY BRANCH IN CARBON COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 3)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION NANTICOKE BRANCH IN LUZERNE COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 5)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION BUTTONWOOD BRANCH LUZERNE COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 9)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN MINOOKA JUNCTION AND SCRANTON, PA.

Finance Docket No. 26659 (Sub-No. 10)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE CENTRAL RAILROAD CO. OF PENNSYLVANIA -- ABANDONMENT OF OPERATION EASTON & WESTERN BRANCH IN NORTHAMPTON COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 11)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE ALLENTOWN TERMINAL RAILROAD COMPANY -- ABANDONMENT OF OPERATION ALLENTOWN, PA.

Finance Docket No. 26659 et al.

Finance Docket No. 26659 (Sub-No. 12)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION BETWEEN HUDSON-UNION JUNCTION AND MINOOKA JUNCTION, PA.

Finance Docket No. 26659 (Sub-No. 14)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION BETWEEN LEHIGHTON AND PACKERTON, PA., AND BETWEEN HETCHEL AND FRASER, PA.

Finance Docket No. 26659 (Sub-No. 15)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE LEHIGH AND NEW ENGLAND RY. COMPANY -- ABANDONMENT OF OPERATIONS BETWEEN BETHLEHEM AND UHLERS, PA., AND BETWEEN HAUTO AND TAMAQUA, PA.

Finance Docket No. 26659 (Sub-No. 16)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN HAMPTON AND PHILLIPSBURG, N. J.

Finance Docket No. 26659 (Sub-No. 17)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN HIGH BRIDGE AND WHARTON, N. J.

Finance Docket No. 26659 (Sub-No. 18)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN ROYCE AND FLEMINGTON, N. J.

Finance Docket No. 26659 (Sub-No. 19)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN MATAWAN AND FREEHOLD, N. J.

Finance Docket No. 26659 (Sub-No. 21)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN KEYPORT AND ATLANTIC HIGHLANDS, N. J.

Finance Docket No. 26659 (Sub-No. 23)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN EAST LONG BRANCH AND BRANCHPORT, N. J.

Finance Docket No. 26659 (Sub-No. 26)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN RARITAN AND HAMPTON, N. J.

Finance Docket No. 26659 (Sub-No. 27)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE DOVER AND ROCKAWAY RAILROAD -- ABANDONMENT BETWEEN WHARTON AND ROCKAWAY, N. J.

Finance Docket No. 26659 (Sub-No. 28)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE WHARTON AND NORTHERN RAILROAD -- ABANDONMENT BETWEEN MORRIS COUNTY JUNCTION AND GREEN POND JUNCTION, N. J.

Finance Docket No. 26773

JOHN F. NASH AND ROBERT C. HALDEMAN, TRUSTEES LEHIGH VALLEY RAILROAD COMPANY -- OPERATION BETWEEN EASTON AND SCRANTON, PA.

Finance Docket No. 26781

READING COMPANY -- OPERATION BETWEEN ALLENTOWN, PA., AND PHILLIPSBURG, N. J.

Upon consideration of the record in the above-entitled proceedings, the report and certificate and order of the Commission, decided May 26, 1972, and the petitions for reconsideration filed July 3, 1972, by the Railway Labor Executives' Association, and jointly by the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, and the City of Philadelphia, and those filed July 5, 1972, by the United Transportation Union and by the Erie Lackawanna Railway Company, the replies thereto filed July 24, 1972, by R. D. Timpany, Trustee of the property of the Central Railroad Company of New Jersey, and jointly by the Asbury Graphite Mills, Inc., Grief Bros., Corporation, Wedco, Inc., and Hunterdon County, N. J., of the reply filed July 25, 1972, by the Trustees of the Lehigh Valley Railroad Company; and of the telegram filed July 20, 1972, by the Trustees of the Lehigh Valley Railroad Company; and

It appearing, That the petitions for reconsideration set forth no material facts or arguments in addition to those previously considered in the proceedings; that the findings in the report and certificate and order of May 26, 1972, are adequately supported by the record; that the conditions which were necessary for our approval of the transaction were imposed upon the Central Railroad of New Jersey and the Lehigh Valley Railroad Company, and not on the Erie Lackawanna as stated in the said telegram; that there has been presented no error of fact or law with respect to the matters complained of by petitioners; and, that no showing has been made warranting reconsideration:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

JOSEPH M. HARRINGTON
Acting Secretary

(SEAL)

SERVICE DATE
SEPTEMBER 11, 1972

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23rd day of August, 1972.

INVESTIGATION AND SUSPENSION DOCKET NO. 8667
ROUTING VIA OAK ISLAND JCT., NEW JERSEY

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 1)
ROUTING VIA LAKE JCT., N. J.

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 2)
ROUTING VIA LAKE JCT., N. J.

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 3)
ROUTING VIA BOUND BROOK JCT., NEW JERSEY

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 4)
ROUTING VIA LAKE JCT., N. J.

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 5)
ROUTING VIA LAKE JCT. N. J.

Upon consideration of the record in the above-entitled proceedings, the report and order of the Commission, decided May 26, 1972, and the petitions for reconsideration filed July 3, 1972, by the Railway Labor Executives' Association, and jointly by the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, and the City of Philadelphia, and those filed July 5, 1972, by the United Transportation Union and by the Erie Lackawanna Railway Company, the replies thereto filed July 24, 1972, by R. D. Timpany, Trustee of the property of the Central Railroad Company of New Jersey, and jointly by the Asbury Graphite Mills, Inc., Grief Bros., Corporation, Wedco, Inc., and Hunterdon County, N. J., of the reply filed July 25, 1972, by the Trustees of the Lehigh Valley Railroad Company; and of the telegram filed July 20, 1972, by the Trustees of the Lehigh Valley Railroad Company; and

It appearing, That the petitions for reconsideration set forth no material facts or arguments in addition to those previously considered in the proceedings; that the findings in the report and order of May 26, 1972, are adequately supported by the record; that the conditions which were necessary for our approval of the transaction were imposed upon the Central Railroad of New Jersey and the Lehigh Valley Railroad Company, and not on the Erie Lackawanna as stated in the said telegram; that there has been presented no error of fact or law with respect to the matters complained of by petitioners; and, that no showing has been made warranting reconsideration:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

JOSEPH M. HARRINGTON

(SEAL)

Acting Secretary

Title 28.–Chapter , U. S. Code

Sec. 1336. [*As codified June 25, 1948, August 30, 1964.*] [*28 U.S.C. § 1336.*] Interstate Commerce Commission's ORDERS

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annual or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

Title 28.–Chapter 87, U. S. Code

Sec. 1398. [*As codified June 25, 1948, August 30, 1964.*] [*28 U.S.C. § 1398.*] Interstate Commerce Commission's ORDERS

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Sec. 2325. [*Codified June 25, 1948.*] [*28 U.S.C. § 2325.*]
INJUNCTION; THREE-JUDGE COURT REQUIRED

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1200

COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR LEHIGH COAL & NAVIGATION COMPANY (LC & N) IN OPPOSITION

CHARLES DANZIG,
RIKER, DANZIG, SCHERER & BROWN,
Attorneys for Respondent, Lehigh Coal & Navigation Company (LC & N),
744 Broad Street,
Newark, New Jersey 07102.

February, 1974.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1200

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR LEHIGH COAL & NAVIGATION COMPANY (LC & N) IN OPPOSITION

Questions Presented

1. Whether judicial review of an ICC order authorizing abandonment of certain lines and operations subject to the imposition of traffic protective conditions includ-

ing tariffs, should be instituted in the district court exercising bankruptcy jurisdiction over a railroad in reorganization or in a three-judge district court in another district under the Urgent Deficiencies Act, 28 U.S.C. §2321 et seq.?

2. Whether a District Court may in the exercise of its bankruptcy jurisdiction refuse leave to review such orders of the ICC by a three-judge district court in another district in order to protect its own jurisdiction and to prevent collateral attack on the District Court's Order after the time for appeal therefrom had elapsed?

Statutory Provisions Involved

Section 1(18-20) of the Interstate Commerce Act 49 USC 1 (18)—(20): Section 77(o) of the Bankruptcy Act 11 USC 205(o): Section 1336 (a), (b) and (c) of the Judicial Code, 28 U.S.C. 1336 (a), (b) and (c): Section 1398 (a), (b) of the Judicial Code, 28 U.S.C. 1398 (a) and (b), are set forth at this respondent's appendix below (RA1 to RA4).

Counter-Statement of the Case

Central Railroad Co. of New Jersey ("CNJ") filed its petition for reorganization in the U. S. District Court for the District of New Jersey in March, 1967. The present Trustee was appointed in January, 1971 at a time when the railroad was facing a severe liquidity crisis which threatened to cause a shutdown of all its operations. The State of New Jersey for some years had provided some form of passenger and freight service subsidies; the Commonwealth of Pennsylvania ("Commonwealth") had no present or prospective plans for assist-

ance to CNJ, although CNJ operated some 131 miles of lines in Pennsylvania known as the Lehigh & Susquehanna system ("L&S"), which CNJ had leased from Lehigh Coal & Navigation Co. ("LC&N").

To deal with the crisis the Trustee obtained a grant of $2,000,000 from the State of New Jersey and authority from the Court and Federal agencies to issue up to $2,500,000 in federally-guaranteed Trustee certificates under the Emergency Rail Service Act of 1970, Pub. L. 91-663, 84 Stat. 1975. The Trustee also embarked on a program called "The Blueprint for Survival" designed to permit the CNJ to continue as a viable railroad on a restructured basis. This program included, among other things, the abandonment of all CNJ operations in Pennsylvania and the assumption of such operations by the Lehigh Valley Railroad ("LVRR") which operated lines in Pennsylvania parallel to and in some instances on joint trackage with the L&S. To implement the Blueprint, the Trustee applied to the Reorganization Court for permission under §77(o) of the Bankruptcy Act, 11 U.S.C. 205(o), to file an application with the ICC for approval and authorization of the abandonment of the entire L&S system as well as some small segments of lines in New Jersey. By Order No. 410 entered on May 25, 1971 the Reorganization Court authorized the Trustee to file with the ICC an application to abandon the aforesaid lines and operations. By Order No. 410 the Court reserved jurisdiction of the subject matter and directed the Trustee to apply further to the Court for authority to abandon any lines or operation that may be authorized to be abandoned by the ICC.

The ICC divided the Trustee's application to abandon into 29 parts and in August, 1971 the ICC approved the abandonment of 10 segments, five in New Jersey and five in Pennsylvania. The main part of the L&S system

was left untouched. On December 20, 1971 the Reorganization Court entered Order No. 445 directing the Trustee to temporarily suspend on April 1, 1972 all operations of the Debtor in Pennsylvania and to cease all operations of the Debtor if the ICC denied the Trustee's application to abandon operation of the L&S. This order also enjoined all parties from instituting or maintaining in any other Court any action affecting the Debtor's operations in Pennsylvania. On January 11, 1972 the Reorganization Court entered Order No. 451 authorizing the Trustee to abandon the 10 segments as approved by the ICC. Appeals by the Commonwealth of Pennsylvania and others from these two orders were affirmed *per curiam* by the Court of Appeals in March, 1972. *In the Matter of Central Railroad Company of New Jersey, Debtor*, 455 F. 2d 988, 989, 990 (3rd Cir. 1972). A petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed on behalf of the Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission as to Orders Nos. 445 and 451 was denied on October 10, 1972. *Commonwealth of Pa. et al. v. U. S.* (No. 71-1596), 409 U. S. 894, 34 L. Ed. 2d 151, 93 S. Ct. 113. One of the questions presented in said petition, by the same Petitioners as herein, was whether a review of the decision of the ICC allowing the abandonment of the 10 segments must be in a three-judge statutory court, under the Urgent Deficiencies Act, 28 U.S.C. 2321-2325, or whether the ICC decision must be reviewed either by or upon consent of the Reorganization Court in the railroad reorganization proceeding. The present petition presents the same question again.

On April 1, 1972 the Trustee ceased all operations of the L&S and the Lehigh Valley took over such operations pursuant to ICC service orders. From April 1,

1972 to the present time LVRR has been providing service on the L&S, originally by virtue of the aforesaid service orders, and later pursuant to an agreement between LVRR and LC&N approved by the LVRR Reorganization Court. On May 26, 1972 (service date, June 2, 1972) the ICC authorized the Trustee to abandon the L&S on certain conditions* which the Reorganization Court authorized the Trustee to accept and to abandon the L&S by its order No. 514 issuing on July 5, 1972. Petitioners at no time appealed from Order No. 514 or applied for a stay. Instead, on December 11, 1972 long after the time for appeal expired therefrom, they sought leave to appeal from the aforesail ICC order bearing service date June 2, 1972 to a three-judge statutory Court in the Middle District Court of Pennsylvania. The Reorganization Court denied leave (A-9a) and the Court of Appeals affirmed (A-1a to 8a). This is the first order Petitioners seek to review.

On December 11, 1972 the Reorganization Court also heard the application of LC&N requiring the Trustee to consummate a settlement claimed by the Trustee to be conditioned upon the finality of the ICC order authorizing the abandonment of the L&S. On April 4, 1973 the Reorganization Court decided that "the time to appeal has long since expired and Pennsylvania should not now be heard to complain about the ICC order of June 2, 1972 or of this Court's Order No. 514 entered July 5, 1972 . . ." (A-14a). The Court issued Order No. 583 directing the Trustee to consummate the LC&N settlement (A-15a) and the Court of Appeals affirmed (A-11a) on the basis of the opinion rendered in connection with

* Central R. Co. of N. J.—Abandonment, 342 ICC 227 (1972); on August 23, 1972 (service date Sept. 11, 1972) the ICC denied petitioners' petition for reconsideration.

the appeal from Order No. 550, *In The Matter of the Central Railroad Company of New Jersey*, No. 73-1110 (3rd Cir. Sept. 20, 1973) (A-11a). This is the second order Petitioners seek to review.

ARGUMENT

1. The instant case does not involve the abandonment of railroad service to the public on the L&S. The present controversy had its origin in a contest between Reading Railroad (in reorganization), the nominee of petitioners, and LVRR (in reorganization) to furnish service on the L&S when the CNJ ceased operations thereon. The ICC selected LVRR which has been rendering service on the L&S to the present time. The Reading has since the rejection of its application by the ICC, lost interest in the furnishing of substitute service. All this was part of the record in the District Court and the Court of Appeals.

2. In their prior petition for certiorari relating to Orders Nos. 445 and 451 (No. 71-1596) the petitioners presented the very same question they now present in the instant Petition.

We adopt and incorporate herein as to the District Court Orders Nos. 550 and 583 what was stated in the brief for the United States at pp. 5-7 in opposition to the prior petition dealing with Orders Nos. 445 and 451:

> "The district court's orders were a proper exercise of its bankruptcy jurisdiction. The petition presents no question warranting further review.
>
> Contrary to petitioners' contention, a reorganization court has jurisdiction to review Interstate Commerce Commission orders deciding abandonment ap-

plications filed by the trustee, and the court, to protect its review jurisdiction, may enjoin the parties from seeking review of such orders in another forum. See *New Haven Inclusion Cases*, 399 U. S. 392; *Chicago & North Western Ry. Co.* v. *United States*, 52 F. Supp. 65 (N. D. Ill.), affirmed *per curiam*, 320 U. S. 718. To permit appeal from the Commission's orders to be taken to a district court unfamiliar with the reorganization would result in confusion, unnecessary expense, and excessive delay, the very evils which Congress has sought to eliminate in railroad reorganizations. As this Court noted in *New Haven Inclusion Cases, supra*, at 421:

> "• • • the Commission was required to certify its proposal to the court as a prerequisite to judicial approval. § 77(d), 11 U.S.C. § 205(d). Injunctive intervention by the three-judge court would thus have disrupted an essential statutory phase of the New Haven reorganization.'

Here, as in *New Haven Inclusion Cases*, the variety of issues and parties raises the possibility of multiple litigation in several district courts unless primacy is accorded a single forum. See 399 U. S., at 418-419 n. 50. See also *In re Penn Central Transportation Co.*, 329 F. Supp. 387, 390 (E. D. Pa.), affirmed, 446 F. 2d 1109 (C. A. 3). Moreover, confining review to the reorganization court should not affect the outcome of the litigation: since Section 77(o) of the Bankruptcy Act incorporates Section 1(18) of the Interstate Commerce Act, the question of public convenience and necessity may be reviewed by the reorganization court, and such a court would exercise the same scope of review as a three-judge court.

> The power of a bankruptcy court to enjoin parties from litigation which would hamper exercise of its statutory responsibility or would otherwise interfere with exercise of its jurisdiction over the debtor is well established. 11 U.S.C. 11(a)(15). See *Continental Illinois National Bank* v. *Chicago, R.I. & Pac. R. Co.*, 294 U. S. 648, 675. See generally, 1 Collier, *Bankruptcy*, para. 2.60-2.62. Any delay engendered here by intrusion into the review process by a three-judge court unfamiliar with the C.N.J. reorganization might seriously hamper the reorganization court in exercising its statutory responsibility. The district court was therefore justified in restraining the litigants from proceeding in some other forum."

3. Petitioners concede that §§1336 and 1398, 28 U.S.C. 1336 and 1398, confer exclusive jurisdiction on the District Court making a referral to the ICC to review the resulting ICC order (Pet. p. 8). Petitioners question, however, whether Order No. 410 authorizing the Trustee to file applications with the ICC for permission to abandon certain lines operated by the Trustee which included the L&S, is such a referral. By Order No. 410 the Court not only authorized the Trustee to file applications for abandonment with the ICC, but also reserved jurisdiction of the subject matter and directed the Trustee to apply further to the Court for authority to abandon any lines or operations that may be authorized to be abandoned by the ICC (A-5a Footnote 6). A clearer case of "referral" cannot be found. Moreover, the District Court regarded the abandonment of the L&S as "effected pursuant to §77(o) of the Bankruptcy Act" (A-13a). The Court of Appeals also considered the abandonment authorized by the ICC to be the result of a referral by the District Court under §77(o) (A-5a Foot-

note 6). Petitioners do not agree with the findings made by the Court of Appeals and the District Court that Order No. 410 constituted a 77(o) referral to the ICC. This is a question of fact hardly deserving the attention of this Court.

Indeed, §77(o) requires that abandonments be referred to the ICC "when required by the Interstate Commerce Act"; the District Court's Order No. 410 conformed to the requirements of that Section. Section 77(o) further provides that the Trustee shall take all proceedings necessary for the consummation of any such abandonment in accordance with the order of the Judge and that "any such order of the Judge shall be a final order". Hence, the Court of Appeals was correct in the case at bar when it stated:

> "The wording and legislative history of 28 U.S.C. §§1336(b) and 1398(b), as well as of §77(o) of the Bankruptcy Act 11 U.S.C. §205(o), show that Congress intended appeals of abandonment orders in railroad reorganization cases to be reviewed in the context of the reorganization proceedings and not in a court of coordinate jurisdiction. See *Leonard Bros. Trucking Co.* v. *United States*, 301 F. Supp. 893, 898 (S. D. Fla. 1969); *House Report* 1015, 88th Cong. 2d Sess., to accompany H.R. 7508 . . ." (A-6a Footnote 6)

Petitioners' contention at p. 7 that it has been the settled practice to institute actions in three-judge courts to review ICC abandonment Orders is without merit in view of the provisions of §§1336(b) and 1398(b). These Sections were enacted in 1964 (Pub. L. 88-513, §1, 78 Stat. 695 and Pub. L. 88-513, §2, 78 Stat. 695) and render obsolete the older cases cited by petitioners such as *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946).

Congress' purpose in enacting these provisions was explicitly to keep Commission matters within the control of the referring court. Congress felt that the history of the prior act demonstrated both that the expertise of the referring court was being frustrated and that unnecessary delay was being tolerated in courts which lacked the referring court's sense of urgency. See 1964 U.S. Code Cong. and Adm. News, p. 3235 for the legislative history; see also *Leonard Bros. Trucking Co.* v. *U. S.*, 301 F. Supp. 893 (S. D. Fla. 1969); *H. Messick, Inc.* v. *Baggett Transportation Co.*, 268 F. Supp. 459 (W. D. Mo. 1967).

4. The Petitioners have failed to take an appeal from Order No. 514 entered July 5, 1972 which authorized the Trustee to abandon the L&S and accept the ICC conditions involving traffic protective conditions including tariffs. The time for such appeal has long ago expired. Petitioners seek to excuse such failure by pointing to their interim efforts to obtain reconsideration from the ICC of the L&S abandonment order of May 26, 1972 (service date June 2, 1972). This effort terminated on August 23, 1972 (service date September 11, 1972) when their petition for reconsideration was denied. They offer no excuse for their failure to seek to have the District Court stay its hand pending reconsideration by the ICC. Had petitioners sought a stay from the District Court there would have been no conflict (as to which they now complain) between "the agency's procedure regarding petitions for reconsideration" and the "reorganization procedures"; nor did Petitioners appeal from Order No. 514 and urge the grounds they now urge. They should not be permitted to do indirectly via a petition for the writ which they have been barred for a long time from doing directly.

5. Petitioners' contentions (Pet. 10) that in affirming Order No. 550 the Court of Appeals relied on its 1972 recision affirming Order No. 445 authorizing temporary suspension of operations in Pennsylvania and that the 1972 decision has been overruled by the *en banc* decision in *In re Central Railroad Company of New Jersey*, 485 Fed. 2d 208 ignores the record in the Court of Appeals in the instant case. The record in the Court of Appeals shows that on the appeal from Order No. 550, LC&N urged that the affirmance of Order No. 445 by the Court of Appeals in March 1972 *In the Matter of the Central Railroad Company of New Jersey, debtor* and related cases 455 F. 2d 988, 989, 990 compelled an affirmance by that Court in the instant case of Order No. 550 under the doctrines of law of the case and res judicata. The Court of Appeals, however, declined to decide the issue on these grounds and stated that the *rationale* for its affirmance of No. 550 made it unnecessary for it to determine whether the doctrines of law of the case and res judicata controlled (A-5a Footnote 5). The basis for its decision was 28 U.S.C. §§1336(b), 1398(b) and §77(o) as well as the cases cited at A-5a and A-6a and in Footnote 6.

In making the aforesaid contention Petitioners also ignore the plain language of the *en banc* decision. The *en banc* Court did not expressly or impliedly overrule the 1972 decision. On the contrary, it refused to apply the 1972 decision because it was distinguishable from the case then before it. 485 F. 2d 208 at 211. It noted that the 1972 decision authorized suspension of service pending ICC action on CNJ's application for abandonment which action was unduly delayed. It also noted that in the case before it no application for approval of suspension of service had been filed with the ICC or with any state regulatory agency.

Moreover, in the 1972 case there was implied approval by the ICC of the suspension of operations of the L&S by CNJ in the form of the ICC service order authorizing LVRR to take over operations of the L&S immediately upon the suspension of service by the CNJ. There was no such takeover of service or any application pending therefor with the ICC or any other agency in the *en banc* case.

But above and beyond everything else the Court had before it in the instant case the fact that the ICC had finally approved the abandonment of the L&S by the CNJ and the permanent assumption of CNJ operations of the L&S by LVRR and that this approval was the basis for the entry of Order No. 514 on July 5, 1972 from which Petitioners took no appeal or attempted to stay but instead resorted to a series of applications, of which the case at bar is only one, designed to prevent this chapter in the history of the CNJ from being brought to a close. *In re Huntington & Broad Top Mt. R. R. & Coal Co.*, 213 F. 2d 411 (3rd Cir. 1954)—a fact not lost on the Court of Appeals, as its opinion indicates A-3a to A-6a.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February, 1974.

APPENDIX R

Section 1(18)-1(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)-1(20):

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall

cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commissioner shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the

provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 77(o) of the Bankruptcy Act, 11 U.S.C. 205(o):

(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale,

and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

§ 1336. Interstate Commerce Commission's orders

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final. As amended Aug. 30, 1964, Pub.L. 88-513, § 1, 78 Stat. 695.

§ 1398. Interstate Commerce Commission's orders

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall

be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue. As amended Aug. 30, 1964, Pub.L. 88-513, § 2, 78 Stat. 695.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1200

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT R. D. TIMPANY, TRUSTEE IN REORGANIZATION OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

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March, 1974.

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT R. D. TIMPANY, TRUSTEE IN REORGANIZATION OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

Counter-Statement of Questions Presented

Whether Petitioners have advanced special or important reasons for reviewing, in a dispute which events have

rendered moot, either the Reorganization Court's discretionary refusal to grant relief from a validly imposed stay or the Reorganization Court's determination as to the finality of certain ICC orders.

Counter-Statement of the Case

In early 1971, shortly after assuming his duties as Trustee in Reorganization of the CNJ, Respondent evolved a program known as the Blueprint for Survival to resolve the cash crisis confronting the estate and provide a reasoned basis upon which the CNJ could continue to provide essential rail services in the future. As pertinent here, the Blueprint sought to shrink the configuration of the CNJ by abandoning all of its Pennsylvania operations, shifting from Pennsylvania to New Jersey its points of interchange with other railroads of traffice originating on, terminating on, and bridging CNJ's proposed area of reduced configuration. CNJ's Pennsylvania operations were largely over the Lehigh & Susquehanna Railroad (L&S) on a long-term lease from the Lehigh Coal & Navigation Co. (LCN).

To implement the Blueprint, Respondent filed an abandonment application with the ICC (which was assigned Finance Docket No. 26659), entered into negotiations with carriers for the establishment of new interchange points (which led to the tariff routing case assigned Investigation & Suspension Docket No. 8667) and entered into negotiations with LCN to resolve claims between the parties including those pertaining to the termination of the existing lease of the L&S. LV applied to the ICC to take over CNJ's Pennsylvania operations.

In August of 1971 the ICC granted a small portion of the abandonment application; the Reorganization Court,

by Order No. 451, authorized the abandonment of the segments involved, pursuant to §77(o) of the Bankruptcy Act, in January of 1972; and the Third Circuit affirmed the §77(o) order which had been challenged on appeal by petitioners. 455 F. 2d 990 (3d Cir. 1972).

In November of 1971 Respondent and LCN entered into a settlement agreement providing in part for a $500,000 payment by the CNJ estate to LCN and the exchange of general releases, conditioned upon the entry by the ICC of final orders permitting abandonment of CNJ's operation of the L&S; the Reorganization Court entered an order approving the terms of the settlement; and this order was affirmed by the Third Circuit on an appeal brought by Petitioners here. 455 F. 2d 988 (3d Cir. 1972). In December of 1972 the Reorganization Court entered an order (No. 445) authorizing the Debtor to suspend on April 1, 1972 all operations in the State of Pennsylvania pending the outcome of its abandonment applications then before the ICC and enjoining all parties from maintaining any action affecting the operations (or the cessation or abandonment thereof) of the Debtor in Pennsylvania in any court other than the Reorganization Court without first obtaining leave to do so. This order was challenged on appeal by Petitioners and was affirmed by the Third Circuit, 455 F. 2d 989, cert. den. 409 U. S. 889 (1972).

On April 1, 1972 CNJ ceased its Pennsylvania operations; and the LV stepped in with alternative service to CNJ's Pennsylvania customers under a new lease arrangement with LCN. On May 26, 1972 the ICC issued two reports and orders both bearing service date of June 2, 1972 and resolving the interrelated abandonment and routing proceedings. 341 ICC 129; 342 ICC 227. The two reports and orders were explicitly interdependent, providing for the Pennsylvania abandonments, new in-

terchange points in New Jersey, various traffic protective arrangements and the establishment of certain through train service. Shortly after the two ICC reports and orders were served, Respondent filed in the Reorganization Court a single petition to obtain pursuant to §77(o) of the Bankruptcy Act court authorization for the abandonments and compliance with the interrelated conditions of the ICC abandonment and routing orders. The authorization was granted by Order No. 514 entered on July 5, 1972 from which Petitioners did not appeal. The Trustee thereafter irrevocably changed the status quo by implementing all of the conditions and other terms of the ICC and court orders.

In November of 1972 Petitioners applied to the Reorganization Court pursuant to the stay provisions of Order No. 445 for leave to review in the Middle District of Pennsylvania portions of the ICC abandonment order decided on May 26, 1972. The hearing on the motion was held on December 11, 1972 at which time Petitioners orally expanded their request to include leave to appeal the ICC routing orders as well.

Petitioners' motion was heard along with a motion which had been filed by LCN seeking payment of the $500,000 in settlement proceeds and asserting, *inter alia,* the finality of the ICC orders which under the settlement agreement was the condition precedent for such payment. The Reorganization Court, in the exercise of its discretion, refused to grant Petitioners leave from the stay provisions of Order No. 445 to review the ICC orders in the Middle District of Pennsylvania; and it entered Order No. 550 denying Petitioners' motion. Thereafter it entered Order No. 583 determining that the ICC orders involved were final and directing the Trustee to consummate the settlement with LCN.

Order Nos. 550 and 583 were affirmed on appeal; and Petitioners' application for a rehearing on Order No. 550 was denied. The petition for certiorari followed.

ARGUMENT

On April 1, 1972 CNJ temporarily suspended its Pennsylvania operations and LV assumed such operations. By orders of August 20, 1971 and May 26, 1972 the ICC authorized the abandonment by CNJ of all of its Pennsylvania operations and the establishment of certain routtings subject to compliance with an elaborate set of conditions. On January 11, 1972 by Order No. 451 and July 5, 1972 by Order No. 514 the CNJ Reorganization Court authorized abandonments of all of CNJ's Pennsylvania operations and compliance with the elaborate set of conditions contained in the aforementioned ICC orders. Shortly after the entry of Order No. 514 Respondent fully complied with the conditions and fully abandoned all of its Pennsylvania operations.

Petitioners opposed CNJ's departure from Pennsylvania. However, they did not obtain a stay of the temporary suspension of operations occurring on April 1, 1972 and did not seek a stay of the final abandonment. Moreover, they appealed Order No. 451 and lost and never appealed Order No. 514. CNJ has been out of Pennsylvania for almost two years; and LV has provided alternative services. Events have rendered moot the dispute of which the within petition for certiorari is the dying gasp. *Requiescat in pace.*

When the Reorganization Court entered Order No. 550 refusing, as an exercise of discretion, to grant leave from the stay provisions of Order No. 445 for Petitioners to review the ICC orders of May 26, 1972 in the Middle District of Pennsylvania, it had before it:

(a) The LCX motion giving rise to Order No. 583 requiring it to pass upon the finality of the ICC orders in a manner which would bind Petitioners since the Commonwealth of Pennsylvania is a party intervenor to the CNJ reorganization proceeding. Finality was certain to be an issue in Petitioners' proposed suit in the Middle District of Pennsylvania;

(b) Serious questions as to whether any right of review still existed in view of (1) the fact that Order No. 514 had become final without appeal; (2) the language concerning finality in §77(o); (3) the expiration of the limitation period contained in 28 U.S.C. 1336(c); and (4) the fact that events had mooted the underlying dispute;

(c) Serious doubts existed, even if the right to review were still alive, as to whether a three-judge court had any jurisdiction at all to hear such matter in view of the exclusive jurisdiction and venue conferred upon a referral court by 28 U.S.C. 1336(b) and 1398(b) and in view of settled case law indicating the inapplicability of the Urgent Deficiencies Act to cases not involving urgent public issues of widespread effect. *United States* v. *Griffin*, 303 U. S. 226 (1938); *United States* v. *ICC*, 337 U. S. 426 (1949); *Bondholders' Protective Committee* v. *ICC*, 432 F. 2d 268 (3d Cir. 1970);

(d) Even if there were jurisdiction with matters like the Blueprint in a statutory three-judge court, the *New Haven Inclusion* Cases, 399 U. S. 392 (1970) clearly established the concurrent and preferred jurisdiction of the Reorganization Court in matters like the Blueprint of crucial significance to the reorganization proceeding.

Under such circumstances the refusal to grant leave was not a clearly erroneous exercise of discretion and does not present special and important reasons justifying the

grant of a Writ of Certiorari. Nor does the determination of finality contained in Order No. 583. The mootness of the dispute, the expiration of the appeal period for Order No. 514, and the running of the 90-day statute of limitations contained in 28 U.S.C. 1336(e)—all underscore the finality which the Court found.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Stanley Weiss
Attorney for Respondent
R. D. Timpany

March, 1974

SUPREME COURT, U. S

FILED

MAR 22 197

MICHAEL RODAK, JR.

No. 73-1200

In the Supreme Court of the United States

OCTOBER TERM, 1973

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of judgments of the court of appeals (Pet. App. 7a, 11a) upholding the jurisdiction of the United States District Court for the District of New Jersey, sitting as a reorganization court, to review Interstate Commerce Commission orders deciding abandonment applications, and to enjoin petitioners and the other parties to the reorganization from seeking review of such orders in any other district court (Pet. App. 9a-10a, 12a-14a).

In *Matter of the Central Railroad Company of New Jersey*, 455 F. 2d 989, certiorari denied *sub nom. Pennsylvania* v. *United States*, 409 U.S. 894, petitioners unsuccessfully sought review of the same issue with respect to prior orders of the same reorganization court.

For the reasons set forth in the opinion of the court of appeals (Pet. App. 1a-6a), upon which we rely, and for the additional reasons urged by the government in its brief in opposition filed in the prior proceedings,[1] petitioners' contentions are without merit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[1]We are serving counsel for all parties with copies of our brief in that proceeding.

DOJ-1974-03